



PRESIDENT'S COUNCIL on INTEGRITY & EFFICIENCY
EXECUTIVE COUNCIL on INTEGRITY & EFFICIENCY



October 31, 2000

The Honorable Daniel Marcus
Associate Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Marcus:

We are pleased to respond to your letters of September 29, 2000, seeking the views of the President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE) on the "Report on the Reasonable Expectations of Confidentiality Under the Administrative Dispute Resolution Act of 1996". Enclosed are the consolidated comments and suggested revisions of the various Offices of Inspector General comprising both the PCIE and the ECIE.

The Inspector General community considers the Report to reflect an effort to balance the need for confidentiality in alternate dispute resolution (ADR) proceedings with the need for access to information in order to protect the integrity of agency programs and activities. We also believe that the instances in which an Office of Inspector General would seek confidential information arising from an ADR proceeding would be rare. Accordingly, the suggested revisions and comments are few in number and limited in scope. They are proposed in the interest of clarity or to raise issues that may not have been considered by the drafters of the Report.

While these consolidated comments reflect the collective input of the Inspector General community, each Inspector General reserves the right to comment separately on the Report. Such comments, if any, will be submitted under separate cover by the particular Office of Inspector General.

In addition to the comments and suggestions relating to particular sections of the Report, the Inspectors General have some questions on issues that do not appear to have been addressed in the Report. These questions are set forth at the end of our comments and suggested revisions. The Inspector General community recognizes that the ADR Act may not provide answers to these questions. However, we believe that it would be useful for the drafters of the Report to address these issues of broad application.

Finally, the PCIE and the ECIE would like to compliment the drafters of the Report on their efforts, and to thank you for inviting our comments on the Report.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gaston L. Gianni, Jr.".

Gaston L. Gianni, Jr.
Vice-Chair
PCIE

A handwritten signature in cursive script, appearing to read "Barry R. Snyder".

Barry R. Snyder
Vice-Chair
ECIE

Enclosure

cc: Peter Steenland, Department of Justice
Jeffrey M. Senger, Department of Justice

**PCIE AND ECIE CONSOLIDATED COMMENTS AND SUGGESTED REVISIONS
TO THE
REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER THE
ALTERNATIVE DISPUTE RESOLUTIONS ACT OF 1996**

Please note: the recommended additions are in bolded script; the recommended deletions are in strike-out script.

III. SECTION-BY-SECTION ANALYSIS

• Reference: Section 574(a)

In general, a neutral in a dispute resolution proceeding is prohibited from disclosing any dispute resolution communication or any communication provided to him or her in confidence. ~~Unless the communication falls within one of the exceptions listed below, t~~The neutral cannot voluntarily disclose a communication and cannot be forced to disclose a communication through a discovery request or by any other compulsory process.

~~The~~ **Specific** exceptions to this general rule are found in subsections 574(a)(1) - (4), 574(d) and 574(e). **Public policy considerations that affect confidentiality are discussed and clarified further in the Questions & Answers portion of this Report.**

Rationale: The Questions & Answers drafted by the Subcommittee set forth certain public policy considerations that may limit confidentiality under the ADR Act. This change recognizes that fact.

Reference: Section 574(h)

Information from and about dispute resolution proceedings may be used for educational and research purposes, **or in cooperation with other agencies, governmental entities, or dispute resolution programs**, as long as the parties and specific issues in controversy are not identifiable.

Rationale: This change incorporates and tracks the language of the ADR Act. There are likely to be uses for this information beyond educational and research purposes.

IV. QUESTIONS & ANSWERS

• Reference: Question # 3

3. What confidentiality protection applies to a “communication provided in confidence” by a party to a neutral?

A neutral **generally** may not disclose any communication provided in confidence. *Citation: 5 USC 574(a).* However, **The ADR Act contains specific exceptions to the general rule. Citation: 5 USC 574(a), (b).** Moreover, a communication that evidences fraud, waste, abuse, corruption, a violation of law, or a threat of imminent danger or serious harm, is not a communication “provided under circumstances that would create a reasonable expectation that it not be disclosed.” [See, question # 1.2, above.]

Therefore, such communication may be disclosed. In addition, there are statutes and regulations that require a neutral to make such disclosure.

Rationale: Various laws and regulations require that a neutral must disclose certain information obtained during the course of an ADR proceeding. Therefore, such information should not be deemed to be protected by the ADR Act. See, Question #11, part 9.

- Reference: Question # 11, part 7 ("Information sought for specific purposes.")

Add the following (third) example to the two examples in the current draft:

Example: An ADR program administrator may provide statistical information to an auditor or inspector who is evaluating the efficiency and effectiveness of an ADR program.

Rationale: This change provides an example relating to the statutory language added to the section-by-section analysis of section 574(h).

- Reference: Question # 11

Add a new part I to the eight items (A through H) already contained in the current draft.

I. Information required by statute or regulation to be disclosed

Certain statutes and regulations require that particular information that would otherwise be confidential under the ADR Act must be disclosed.

Example: If an individual has knowledge that a felony has been committed, that individual may not conceal the felony simply because it was part of an ADR communication. (18 U.S.C. § 4)

Example: A federal employee who receives a communication that evidences fraud, waste, abuse, corruption, or a violation of law, must report such evidence to an appropriate authority. (Cf., 28 U.S.C. § 535; 5 C.F.R. § 2635.101(b)(11); specific agency reporting requirements.)

Rationale: Participants in an ADR process should realize that there are circumstances in which law or regulation require that information that would otherwise remain confidential must be disclosed. The ADR Act should not be read as requiring a neutral or a party to place themselves in jeopardy of criminal prosecution (18 U.S.C. §4) or agency disciplinary action.

- Reference: Question # 14 ("Does ADR Act provide confidentiality protection for all evidence used in the course of a dispute resolution proceeding?")

No. All evidence that is otherwise discoverable, including any document or other material that existed prior to the proceeding, or that was prepared for purposes other than the proceeding, is not protected merely because it was presented at a dispute resolution proceeding. Citation: 5 USC 574(f).

Rationale: This change more accurately reflects the intent and legislative history of the ADR Act to exclude pre-existing material or independently-created material from the confidentiality protections that the Act provides.

- Reference: Question # 15 (“Does the ADR Act protect against the disclosure of dispute resolution communications in response to requests by federal entities for such information?”)

NOTE: These recommendations refer to four of the bulleted items at the end of the section for Question # 15, following the sentence that reads, “In order to prevent unnecessary disputes over requests for information pursuant to an access statute and to mitigate damage to ADR programs, we recommend:” We have listed only the four items for which we are making recommendations.

Procedures should be established for access to information that recognize both the importance of confidentiality to the agency’s ADR program, as well as the importance of obtaining information for purposes of overall agency integrity.

Requesting entities should seek confidential information only after other potential sources have been exhausted if the information is not reasonably available through other means.

Requesting entities should seek information from a neutral only as a last resort if the information is not otherwise reasonably available.

If a federal employee party or neutral receives a request for disclosure, he or she should contact the agency’s ADR program as soon as possible to discuss appropriate courses of action, unless such notification could reasonably be expected to interfere with an ongoing investigation. Neutrals must also notify parties of any such request (See, in addition, Question 19).

Rationale: The recommended changes acknowledge the need for procedures that balance the requirements of confidentiality with the legitimate needs of other federal entities for the information. Various federal entities may need certain information in order to fulfill their responsibilities under statute or regulation.

- Reference: Question # 16 (“May parties agree to confidentiality procedures which are different from those contained in ADR Act?”) [3rd paragraph]

If the parties agree to alternative confidentiality procedures regarding disclosure by a neutral, they must so inform the neutral before the dispute resolution proceeding begins or the confidentiality procedures in the ADR Act will apply. An agreement providing for alternative confidentiality procedures is binding on anyone who signs the agreement.—(See Questions 23 and 24 for potential FOIA implications.) but cannot limit the access of individuals and entities who are not parties to the agreement.

Rationale: This is a self-evident limitation on the scope of the parties’ ability to restrict by contract access to information by individuals or entities who are not parties to the contract. To avoid confusion, this limitation ought to be included in the Questions & Answers and in the agreement itself.

- Reference: Question # 19 ("What must a neutral do when he or she receives a "demand for disclosure" of confidential communications?") [first paragraph only; second paragraph remains unchanged]

~~A demand for disclosure is a formal request for confidential information. The demand must be made by a discovery request or some other legal process. Upon receiving a demand for disclosure of a confidential communication, a neutral must make a reasonable effort to notify the parties and any affected non-party participants of the demand. Notice must be provided even if the neutral believes that there is no basis for refusing to disclose the communication.~~ A demand for disclosure is a request for a dispute resolution communication by discovery or other legal process. Generally, when a neutral receives such a request, he or she must notify the parties and any affected non-party participant. Recommended procedures for such notice are set forth below. It should be noted that, in some circumstances, public policy may require that a neutral refrain from notifying parties and others of a request for information. For example, if the neutral is advised that such notification would interfere with an ongoing investigation, or if the neutral is ordered to provide information pursuant to a grand jury subpoena, notification to a party who is under investigation or who is a material witness could compromise the investigation. In addition, a court order may prohibit notification. Accordingly, while in the vast majority of cases, notification by the neutral will be required, in those instances in which the neutral is constrained by public policy or court order such notification should not be required.

Rationale: The ADR Act provides for notification by a neutral when a request is received for confidential information. However, under some circumstances such notification could violate a court order or could violate public policy, especially where an ongoing federal investigation is concerned. The recommended change is designed to protect both the neutral as well as the government's interests during an ongoing investigation.

V. MODEL CONFIDENTIALITY STATEMENT

The confidentiality provisions of the Administrative Dispute Resolution Act (ADR Act) apply to this process. Generally, if you tell me something during this process, I will keep it confidential. The same is true for written documents you prepare for this process and give to me. **However, documents that were prepared for purposes other than this process are not considered confidential by virtue of the ADR Act, even if they are provided to me.** [Similarly, you are generally required to keep information confidential that you receive during conversations with other parties or me and from writings prepared for this process.] *

Be advised, there are limits on our ability to keep information confidential. If you say something or provide documents to all the other parties it is not confidential. ~~Under rare circumstances~~ **Also, in limited circumstances,** a judge can order disclosure of confidential information. ~~Even though not required by the ADR Act~~ **Finally,** information about a violation of criminal law, or an act of fraud, waste, or abuse, or an imminent threat of serious harm may have to be disclosed to appropriate authorities ~~by a participant, but not necessarily by me.~~

You can agree to more confidentiality if you want to. For example, you can agree to keep confidential things you share with all the parties. If you want to do any of that, it will require the agreement of all parties and should be memorialized in writing. You should be aware that if you agree to more confidentiality, written documents may still be available to others,

for example, through the Freedom of Information Act. You should also be aware that if you agree to more confidentiality, such an agreement is not binding on individuals or entities who are not parties to the agreement. Confidentiality provisions other than those in the ADR Act may also apply to this process.

* - Include for multi-party disputes.

Rationale: The recommended changes provide more complete and accurate notice to the parties of the limitations on confidentiality with regard to documents that were not prepared for purposes of the ADR proceeding, and information regarding a violation of law, or an act of fraud, waste or abuse, or an imminent threat of serious harm.

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Additional Issues

1. The introduction to the Report states that “As federal sector experience with ADR evolves, some issues in this report will be refined and new issues are likely to arise.” What procedures are contemplated to address these issues? Will there be an opportunity for comment?
2. The ADR Act and the Report address protection from disclosure by the neutral of a communication by a nonparty participant in a dispute resolution proceeding. See, 5 U.S.C. § 574(a)(1) and Question and Answer # 9. What protection is afforded to the disclosure by a party of such a communication, particularly if the communication was shared with all of the parties to the proceeding?
3. There seems to be a potential for confusion as to who is “a party” in cases involving the interests of both a federal employee and his or her employing agency. For example, the actions of a federal employee may give rise to a Constitutional tort claim against the employee as well as to a claim under the Federal Torts Claims Act against his or her employing agency. If the employee chooses to resolve the dispute in an ADR proceeding, is the employee “a party” representing his or her personal interest, the interest of the agency, or both? If the employee is deemed to be able to bind the agency, may the employee share dispute resolution communications with agency representatives? Another aspect of this question involves the limitations on sharing ADR communications within an agency. For example, where an agency component is a party to an ADR proceeding and a personnel specialist representing the component is participating in the proceeding, may the personnel specialist share what transpires in the ADR proceeding with his or her supervisors? With management of the component? With management of the agency?